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August 25, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte
CC Docket Nos. 96-262, 01-92

Dear Ms. Dortch:

In this letter, US LEC Corp. provides additional information in opposition to the "Petition for Clarification Or, In The Alternative, Reconsideration" of the *CLEC Benchmark Order*[1] filed by Qwest Communications International, Inc. ("Qwest Petition"). Qwest requests that the Commission reconsider the *CLEC Benchmark Order*, or "clarify" the benchmark rules, to provide that a competitive local exchange carrier ("CLEC") may tariff its access service charges at the total switched access rate of the competing ILEC *only* to the extent the CLEC itself is providing "each of the services necessary to originate and terminate interexchange calls."[2] While Qwest does not provide a proposal for implementing its request, US LEC is deeply concerned that modifying the benchmark scheme to account for "each of the services necessary to originate and terminate interexchange calls" would inevitably damage facilities-based competition in a number of ways: (a) it would impose on CLECs the overly burdensome and inappropriate ILEC rate structures; (b) create substantial disincentives for CLECs to structure their networks to take advantage of next-generation technology because ILEC-modeled rates would lead them to ILEC-configured networks; (c) impose significant unwarranted transition costs on CLECs as they are compelled to restructure their tariffs, networks, and customer contracts to compensate for the unanticipated change in the schedule set out in the *CLEC*

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1 *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, (April 27, 2001) ("*CLEC Benchmark Order*").

2 Qwest Petition, p. 1.

Benchmark Order; (d) create an administrative nightmare as IXCs would be encouraged by the proposed changes and likely would refuse to pay legitimate charges, choosing instead to file a multitude of administrative proceedings challenging whether individual CLECs provided a particular service on certain calls; and (e) destroy the careful balance of competing interests established by the Commission in the *CLEC Benchmark Order*. For all these reasons and others stated herein, the Commission should reject the Qwest Petition and retain the current rules.

The Commission Should Retain the Current Composite Rate Benchmark

The Commission established the benchmark as a composite, single rate cap in part to accommodate the fact that CLECs have a different network architecture than ILECs and, consequently, must have the flexibility to employ a different rate structure to recover costs while, at the same time, giving IXCs the rate relief they were requesting.[3] The Commission stated:

> We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather, it is based on a per-minute cap for all interstate switched access service charges.[4]

In fact, it could significantly thwart the development of long term, facilities-based, competition to impose ILEC rate structures on CLECs. CLECs' networks differ significantly from ILECs'. For example, CLECs have fewer switches. Also, the CLECs make greater use of fiber rings. CLECs' switches serve a much larger geographic area, and provide tandem switching over a much wider area, than do ILECs. Some CLECs are migrating to, or initially deploying, Internet Protocol ("IP") packet-switched networks. In short, while the CLEC provides the same service to an IXC (*e.g.*, the ability to access an end user customer), the network used to provide that service differs greatly from the network used to provide an ILEC's access service. CLEC networks are likely to continue to differ significantly from ILEC networks in the future as facilities-based competition continues to develop. Yet imposing on CLECs the ILEC rate structure and pricing/billing administrative costs, which are based on the ILECs' historical hub and spoke network architecture, would effectively require CLECs to mimic that historical architecture in order to recover the same amount for providing the same service. In short, if the Commission requires CLECs to mimic the ILECs' access rate structure, it would discourage the very innovation and new technologies that competition is supposed to bring to consumers. The significant transition costs to the new rate structure and the ongoing administrative costs necessary to bill under Qwest's proposal would also hamper CLECs' ability to devote necessary capital to innovation and deployment of new technologies.

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3 *CLEC Benchmark Order*, ¶ 55.

4 *Id.*

Because of the difference in networks, applying to CLECs the detailed ILEC rate structures for each and every element necessary to originate and terminate interexchange calls would result in a serious mismatch between networks and cost-recovery. This, in turn, would produce very harmful uneconomic and market-distorting results. Among these would be that CLECs might not be able to recover their access costs. There is absolutely no guarantee that ILEC rates, based on ILECs' massive economies of scale, would result in adequate cost recovery for CLECs. The importance of this issue cannot be overstated. The Commission has recognized that CLEC costs may be higher than ILEC costs.[5] This is of increased concern because the *CALLS Order* imposed significant rate reductions on ILECs, but also established a new $650 Million universal service fund so that price cap ILECs could offset part of the access reductions.[6] As a practical matter, however, CLECs typically are not eligible for participation in this support. Therefore, on its face, requiring CLECs to mimic ILEC rates and rate structures raises a serious question as to whether CLECs could adequately recover their costs.

Even if rates are not actually below CLEC costs for a specific rate element as applied to a specific CLEC, imposition of ILEC rate structures on CLECs could prevent recovery of costs in the most efficient manner. For example, CLECs could be hampered in their ability to innovate with flat rate pricing for some services if the applicable ILEC rate element is traffic sensitive. The result would preclude or retard the growth of facilities-based competition because CLECs could not recover costs in ways that reflect the economics of their networks. This would run directly contrary to the primary objective of access reform: rate structures should permit recovery of costs consistent with the manner in which they are incurred.[7] Ultimately, imposing ILEC rate structures on CLECs would thwart facilities based competition.[8]

Accordingly, the Commission should retain the composite benchmark approach to protect against the market-distorting effects of a more detailed approach that, in effect, prescribes the ILEC rate structure. The composite rate benchmark approach must be retained as a safety valve

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5 *See, CLEC Access Charge Order*, ¶¶ 17, 39.

6 *Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000*)("CALLS Order*"), *aff'd in part, rev'd and remanded in part sub nom. Texas Office of Public Utility Counsel v. FCC*, 265 F. 3d 313 (5th Cir. 2001).

7 *Access Charge Reform*, First Report and Order, 12 FCC Rcd 16094 (1997), ¶ 36.

8 A mismatch between CLEC costs and rate structures could thwart the Commission's longstanding policy of promoting the competitive provisioning of access services. *In the Matter of Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II*, CC Docket No. 91-141, Third Report and Order, FCC 94-118, ¶ 25 (1994) ("*Expanded Interconnection Order*"). The Commission has observed that:

> broader access competition should exert downward pressure on tandem-switched transport rates, while fostering more efficient provisioning of these services by new competitors and LECs. Competition also should encourage innovation and investment in new technologies and could offer increased network reliability through route diversity and redundancy . . . . All of these benefits should contribute to economic growth--by enabling IXCs to use more efficient transport arrangements, by fostering better, more reliable, and more rationally priced access services, as well as by creating new market opportunities for interconnectors. Id.

against the harmful effects of the overly rigid rate making approach that Qwest apparently envisions.

The Commission should also retain the current rule going-forward to avoid a rate making nightmare for both CLECs and regulators. In establishing the current benchmark rules, the Commission noted that there is no justification for imposing on CLECs and regulators the rate making practices that are only appropriate for ILECs. The Commission sought to avoid the "legal and practical difficulties" of comparing CLEC rates to that of any objective standard of reasonableness, including the ILEC access rate.[9] The Commission described the burdensome ILEC rate making process that it sought to avoid:

> Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs.[10]

As the Commission stated, "[g]iven our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers."[11] Instead of imposing these requirements unnecessarily on CLECs, and to preserve flexibility in CLECs' ability to choose rate structures, the Commission established the benchmark as a bright line safe harbor which imposes an aggregate rate rather than the complicated and burdensome rate-making process that is implicit in Qwest's request.

Contrary to Qwest's view,[12] it would be overly burdensome for CLECs to implement a benchmark rate structure that was predicated on "each of the services necessary to originate and terminate interexchange calls." Depending on the precise nature of revised benchmark rules,

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9 *CLEC Benchmark Order*, ¶ 41.

10 *Id.* First, an incumbent LEC must keep its books in accordance with Uniform System of Accounts set forth in Part 32 of the Commission rules. *See* 47 C.F.R. §§ 32.1 - 32.9000. Second, Part 64 of the Commission's rules divides an incumbent's costs between those associated with regulated telecommunications services and those associated with non-regulated activities. *See* 47 C.F.R. §§ 64.901 - 64.904. Third, Part 36 separations rules determine the fraction of the incumbent LEC's regulated costs, expenses and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1 - 36.741. After the total amount of regulated, interstate cost is identified, the access charge and price cap rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs. *See* 47 C.F.R. §§ 69.1 - 69.731. These rules tell the incumbent LECs the precise manner in which they may assess interstate access charges on interexchange carriers and end users. Additionally, the Commission regulates the rate levels incumbents may charge for their access services, requiring them to comply with either the rate-of-return or the price-cap regulations. *Compare* 47 C.F.R. §§ 65.1 - 65.830 (relating to rate of return that certain non-price-cap ILECs may earn on interstate access service) *with CALLS Order*, 15 FCC Rcd at 12962, ¶¶ 151-84 (adopting rate level components for price-cap carriers). Finally, Part 61 requires incumbent LECs to publish their rates in tariffs, and the rules restrict how and when incumbents may change their rates. *See* 47 C.F.R. §§ 61.1 - 61.193.

11 *CLEC Access Charge Order*, ¶ 41.

12 Qwest Reply Comments at 4.

CLECs would have to separate their rates into corresponding elements, determine costs for the particular element, define corresponding rates, and revise their billing systems to determine what functionality is provided on each and every particular call. Even more problematic is that CLECs would have to do this for each and every ILEC in their service territory.

Qwest's proposal would also impose substantial burdens on CLECs and regulators because it would create considerable uncertainty as to when access charges are due. Adopting Qwest's proposal would provide IXCs a subjective basis on which to refuse to pay access charges.[13] As noted, CLECs typically deploy fewer switches than ILECs and each switch serves a larger geographic area than ILEC switches. The extent to which CLECs are providing tandem or end office switching has frequently been seized on by ILECs as an excuse not to pay reciprocal compensation to CLECs notwithstanding the Commission's rules that require such payment.[14] If the Commission were to require CLECs to deduct the ILEC tandem rate from the composite benchmark rate, it is virtually certain that IXCs will immediately claim that all CLEC switches are end office switches and demand a deduction in all cases. Further, the IXCs are sure to claim that if an ILEC is anywhere in the path of the call, then the ILEC's charges should have priority over the CLEC's charges so the ILEC would be paid for so-called "duplicate" functions while the CLEC would not. There is no basis for the Commission to give the ILEC such a priority and it would be unlawful to do so. All of this is likely to produce a *tsunami* of proceedings before courts and the Commission initiated by CLECs to recover tandem access charges, and/or by IXCs seeking an excuse not to pay.

A significant component of the *CLEC Benchmark Order* was the trade-off of lower access rates in exchange for an assurance of payment effected by the presumption of reasonable rates. Qwest's proposal would once again remove this assurance of payment and leave the CLEC industry in a worse position than it was in under the pre-*CLEC Benchmark Order* regime. The Commission stated that one of the reasons it crafted the benchmark mechanism was to avoid a "flood of unreasonable-rate complaints."[15] Adopting Qwest's proposal would produce the very flood of litigation the Commission sought to avoid, serving the interests only of IXCs. Qwest would apparently have the Commission ignore the careful balancing of CLEC and IXC interests reflected in this trade-off by establishing a revised benchmark approach that would favor IXCs. Qwest's proposal does not tinker with the balance, rather it obliterates the balance entirely, choosing instead to further the interests of the IXCs at the expense of the CLECs.

Nor is it necessary to recraft the benchmark to respond to IXC allegations that they are being charged for duplicate functions. In a separate letter filed today addressing application of the benchmark rate to wireless traffic, US LEC explains and provides documentation that IXCs have marketplace solutions available to them to minimize or even to avoid charges from either or

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13 CC Docket No. 96-262, US LEC Corp. and Focal Communications Corp. Reply To, and Comments on, Petitions for Reconsideration at 4 (August 2, 2001).

14 47 C.F.R. Section 51.711(c).

15 *CLEC Benchmark Order*, ¶ 25.

both ILECs and CLECs.[16] In a nutshell, with respect to access traffic generally, IXCs may establish direct connections to the CLEC so that ILEC facilities are bypassed entirely. US LEC stresses that there is no basis for the Commission to establish a regulatory preference for ILECs over CLECs in the provisioning of tandem or other access functions to IXCs. To the contrary, the Commission has a longstanding policy of promoting the competitive provision of access services.[17] In light of this policy, and Congress's intent in the 1996 Act to establish "a pro-competitive, de-regulatory national policy framework ... by opening all telecommunications markets to competition,"[18] the Commission should decline all invitations to establish new rate regulations that discourage CLECs from providing competitive access functions. Instead, the Commission should determine that IXCs have marketplace solutions available to them that can fully address their concerns, even if it could be validly argued in a given routing scenario that CLECs and ILECs are providing duplicate functions. The Commission should not recraft the benchmark to conflict directly with the 1996 Act and the Commission's prior efforts to implement the Act's pro-competition directives.

For all these reasons, the Commission should deny Qwest's Petition and affirm CLECs' right to charge the full composite benchmark rate.

It Would Be Unlawful for the Commission to Grant Qwest's Request for Clarification

The Commission must reject Qwest's request for a "clarification" that current rules require Qwest's intended result. The Commission established the benchmark as a single composite rate and explicitly stated that the <u>only</u> requirement was that the CLEC's rate may not exceed it.[19] The Commission's regulations could not have been more clear: they specify that the rate for interstate switched access services "shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges."[20] The Commission stated that "[t]he only requirement is that the aggregate charge for these services, however, described in their tariffs, cannot exceed our benchmark."[21] Given that the <u>only</u> requirement is that the aggregate charge may not exceed the benchmark, there is absolutely no basis for concluding, as Qwest suggests, that, in fact, there is a further requirement that the CLEC must charge less than the composite benchmark rate in some cases.

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16 Letter from Wanda Montano, Vice President, Regulatory and Industry Affairs, US LEC and Richard M. Rindler, Counsel for US LEC, to William Maher, Chief, Wireline Competition Bureau, WC Docket No. 01-92, August 25 , 2003 (the "Montano Letter").

17 See n. 7, *supra*.

18 S. CONF. REP. NO. 104-230, at 1 (1996).

19 *Id.*

20 47 C.F.R. § 61.26(a)(5). Interstate switched access services "shall include the functional equivalent of the ILEC switched exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line terminating (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching." 47 C.F.R. § 61.26(a)(3).

21 *CLEC Benchmark Order*, ¶ 55.

Further, permitting CLECs to charge the full benchmark rate until at least June 20, 2004 is an important component of the transition established in the *CLEC Benchmark Order*. The Commission established a three year ramp down to the ILEC rate because it wanted to avoid unnecessary damage to growing competition that could be caused by a "flash-cut" to the ILEC rate.[22] The Commission stated:

> This transition period is necessary to permit CLECs to adjust their business plans and obtain alternative sources for the substantial revenues of which the benchmark will deprive them – revenues on which they have previously relied in formulating their business plans because they were not held to the regulatory standards imposed on ILECs.[23]

The Commission selected the specific transition rates to avoid an abrupt change to lower rates, not to precisely tailor rates based on "each of the services necessary to originate and terminate interexchange calls." The Commission had the opportunity to impose a framework predicated on rate elements and chose not to do so; there certainly is no basis to find now that the Commission intended the goal of avoiding rate shock to be superceded by any need, even if theoretically desirable, to refine the benchmark based on each and every access rate element. Accordingly, the transition mechanism requires IXCs to pay the full transition rate without any deduction for portions of the service provided by the ILEC or other carriers.[24]

In fact, Qwest itself envisions that its interpretation of the *CLEC Benchmark Order* would be applied only on a going-forward basis after the transition period. Qwest stated that in the *CLEC Benchmark Order*:

> the Commission concluded that the benchmark rate should eventually be equivalent to the rate charged by the competing ILEC. This appears to mean that, ***when the final benchmark becomes effective***, the tariffed CLEC rate for access services provided by the CLEC should be equivalent or less than the ILEC rate for those services.[25] (emphasis added)

Thus, even assuming that its position had merit on a going-forward basis, which it does not, Qwest is not requesting that transition rates, as distinct from the final benchmark rates, are, or should be, refined to account for each and every access service necessary to originate and terminate interexchange calls. Therefore, the Qwest Petition provides no basis for refining the transition benchmark rates in any respect.[26]

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22 *CLEC Access Charge Order*, ¶ 62.

23 *Id.*

24 Nor is it realistic to expect that CLECs could retroactively establish rates based on each and every service involved in originating or terminating interexchange calls.

25 *Qwest Petition* at 2 (emphasis added).

26 There are significant limits on the ability of the Commission to exceed the scope of requests for reconsideration *Sprint* Corporation *v. FCC*, 315 F.3d 369 (D.C. Cir. 2003)

The IXCs are challenging CLEC access service billing across several fronts. For example, IXCs now object also to having to pay access service charges for wireless-originated calls even though the Commission has ruled that the billing of access services for wireless-originated calls is proper. In the Montano Letter, US LEC also explains that it would be unlawful for the Commission to conclude now that the current benchmark rules do not apply to wireless traffic.[27] US LEC cites relevant case law establishing limits on the Commission's ability to provide a "clarifying" or new interpretation of an existing rule and apply it retroactively. US LEC will not repeat that full discussion here. Suffice it to say that those cases are equally applicable here and preclude the Commission from determining that IXCs under current rules are not obligated to pay the full benchmark rate.

In summary, "[a]n agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning."[28] Further, an agency may not give retroactive effect to an interpretation of an existing rule if the parties have relied on a different, equally reasonable, interpretation of the rule, particularly where, as here, the result of such retroactive application would alter the past legal consequences of the parties' past actions,[29] or "impose new duties with respect to transactions already completed." In this case, US LEC very reasonably relied on the Commission's explicit statement that the <u>only</u> requirement applicable to the benchmark rate was that the rate may not be exceeded. US LEC very reasonably assumed that we could apply the full transition composite benchmark rates without further second guessing by IXCs concerning "each of the services necessary to originate and terminate interexchange calls." US LEC has planned and made numerous business decisions in reliance on the current benchmark rules, including the transition period and the transition rates set up in the *CLEC Benchmark Order*. Therefore, the Commission may not now, in direct contradiction to its previous statements, issue a ruling that in fact, in some cases, US LEC is required to charge less than the composite benchmark rate when traffic is also handled by another carrier. Any such determination would be an entirely new rule which could only be adopted after a refreshed record and, even then, it could have prospective effect only.

Accordingly, the Commission may not interpret current rules to prevent IXCs from paying the full benchmark rate. In addition, for the reasons discussed above, the Commission should also retain the current composite benchmark on a going-forward basis.

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27 See n. 17, *supra*.

28 *Caruso v. Blockbuster-Sony Music Entertainment Center*, 193 F.3d 730, 737 (3d Cir. 1999) at 737, quoting Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 6.10 at 283 (1994).

29 *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219 (Scalia, J. concurring); *Celtronix Telemetry, Inc. v. FCC*, 272 F. 3d 585, 588 (D.C. Cir. 2001).

Conclusion

The Commission should deny Qwest's "Petition for Clarification Or, In The Alternative, Reconsideration" of the *CLEC Benchmark Order*.

Respectfully submitted,

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